

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GREGORY NICHOLAS STESHENKO,
Plaintiff,
v.
SUZANNE GAYRARD, et al.,
Defendants.

Case No.:13-CV-03400-LHK

**ORDER GRANTING MOTION TO
DISMISS WITH PREJUDICE**

Re: Dkt. No. 66

Plaintiff Gregory Nicholas Steshenko (“Plaintiff”) brings this action for age discrimination and retaliation based on not being admitted to three graduate programs at San Jose State University. Defendants Suzanne Gaynard and Tzvina Abramson (collectively, “Defendants”) move to dismiss Plaintiff’s due process claim in his Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 66. Having considered the parties’ briefs, the relevant law, and the record in this case, the Court hereby GRANTS Defendants’ motion to dismiss.

I. BACKGROUND

Plaintiff is a 52-year-old unemployed electrical engineer seeking to re-enter the job market through professional re-training. Second Am. Compl. (“SAC”) ¶ 22. In addition to a Master of

1 Science degree in Electrical Engineering, Plaintiff earned a Bachelor of Science degree in
2 Biochemistry and Molecular Biology from the University of California, Santa Cruz, in 2010. *See*
3 *id.*

4 On November 23, 2012, Plaintiff applied to the Clinical Laboratory Scientist (“CLS”)
5 Training Program at San Jose State University. *Id.* ¶ 28. The CLS Training Program is a one-year
6 academic program combining theoretical training with an internship at a participating clinical
7 laboratory. *Id.* ¶ 23. On January 25, 2013, Plaintiff was notified that his application was denied
8 and that he would not be invited for an interview. *Id.* ¶ 30. According to Plaintiff, much younger
9 applicants, in their 20s, with much more inferior academic credentials and work experience, were
10 invited for interviews and subsequently admitted to the program. *Id.* Plaintiff alleges that he
11 personally knew some of these applicants and observed how they “struggled” while taking the
12 prerequisites for the program. *Id.* Plaintiff later raised these issues with the head of the CLS
13 Training Program, Defendant Suzanne Gaynard. *Id.* However, Gaynard refused to explain the
14 admission decision or to inform Plaintiff about the age statistics of the admitted applicants. *Id.*
15 Accordingly, Plaintiff concluded that he was discriminated against on the grounds of age. *Id.*
16 Plaintiff subsequently filed a complaint with the U.S. Department of Education Office of Civil
17 Rights (“USDOE”). *Id.* ¶ 31.

18 On February 3, 2013, Defendant Tzvia Abramson, the head of the Stem Cell Internships in
19 Laboratory Based Learning (“SCILL”) Program, invited Plaintiff to apply to the SCILL Program.
20 *Id.* ¶ 32. The SCILL Program is a two-year Master of Science program with a year of theoretical
21 training and a year of an internship at a participating research laboratory. *Id.* ¶ 24. On February 28,
22 2013, Plaintiff applied to the SCILL Program. *Id.* ¶ 32.

23 According to Plaintiff, after Abramson contacted Gaynard and learned about Plaintiff’s
24 complaint to the USDOE, Defendants Abramson, Gaynard, and other university employees formed
25 a conspiracy to retaliate against Plaintiff for his complaint. Specifically, the defendants
26 “communicated and agreed that Plaintiff should not be invited for the SCILL admissions interview

1 because of his complaints and his expressed intention to sue.” *Id.* ¶ 33. On May 3, 2013,
2 Abramson notified Plaintiff that he was not selected as “a finalist for this round,” but that Plaintiff
3 was on a waiting list for Fall 2013. *Id.* ¶ 34. Abramson also stated that she would not provide any
4 information about Plaintiff’s ranking on that waiting list. *Id.* However, according to Plaintiff, there
5 was no such thing as a waiting list and the SCILL Program had been “struggling to find . . .
6 minimally qualified students willing to apply.” *Id.* Plaintiff alleges that all of the admitted
7 applicants to the SCILL Program were young, and “their academic credentials were much inferior
8 to those of Plaintiff.” *Id.*

9 On June 10, 2013, Plaintiff notified Gaynard that Plaintiff would file a lawsuit against
10 Gaynard. *Id.* ¶ 35. According to Plaintiff, “Defendants decided to retaliate further” by denying
11 Plaintiff’s admission to graduate studies at San Jose State University’s Department of Biological
12 Sciences. *Id.*

13 Plaintiff alleges that the CLS Training Program, the SCILL Program, and the participating
14 laboratories “heavily discriminate on the grounds of age.” *Id.* ¶ 27. Plaintiff further alleges: “No
15 persons of the protected age have ever been admitted to either of [the CLS Training or the SCILL]
16 programs. The age discrimination is rampant.” *Id.*

17 Plaintiff alleges that he exhausted his administrative remedies with the USDOE on June
18 29, 2013. *Id.* ¶ 7. Plaintiff also alleges that he filed “several timely administrative claims with
19 California State University Chancellor’s Office.” ECF No. 46 at 3. However, Plaintiff’s claims
20 were denied. *Id.* ¶ 8.

21 On July 22, 2013, Plaintiff filed his original Complaint against Defendants. ECF No. 1. On
22 October 22, 2013, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6). ECF No. 12.
23 After the Court granted the parties’ motions to extend time to file a response to the motion to
24 dismiss, on January 23, 2014, Plaintiff filed an opposition. ECF No. 26. On January 24, 2014,
25 Plaintiff filed an addendum to his opposition. ECF No. 28. On January 31, 2014, Defendants filed
26 a reply. ECF No. 29. The Court held a hearing on May 15, 2014. ECF No. 36. Plaintiff filed a
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1 supplemental letter brief on May 16, 2014. ECF No. 35.

2 On May 20, 2014, the Court granted Defendants' motion to dismiss. ("May 20, 2014
3 Order"), ECF No. 42. In the order, the Court granted Defendants' motion to dismiss Plaintiff's
4 claims against the Board of Trustees; Plaintiff's § 1983 retaliation claim against Gaynard and
5 Abramson; and Plaintiff's § 1985(3) claim against Gaynard and Abramson with leave to amend.
6 May 20, 2014 Order at 20. The Court also granted Defendants' motion to dismiss Plaintiff's
7 § 1983 claim based on due process and equal protection violations against Gaynard and Abramson;
8 Plaintiff's Age Discrimination Act claim against Gaynard and Abramson; and Plaintiff's Age
9 Discrimination in Employment Act claim against Gaynard and Abramson with prejudice. *Id.*
10 Finally, the Court declined to exercise supplemental jurisdiction over Plaintiff's remaining state
11 law claims and thus granted Defendants' motion to dismiss Plaintiff's state law claims—FEHA
12 claim, Bane Act claims, and IIED claim. *Id.* at 18–20.

13 On May 31, 2014, Plaintiff filed a First Amended Complaint ("FAC") against Defendants.
14 ECF No. 45. On June 1, 2014, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6).
15 ("MTD"), ECF No. 49. On June 29, 2014, Plaintiff filed a response. ECF No. 51. On July 10,
16 2014, Defendants filed a reply. ECF No. 53.

17 On September 29, 2014, the Court granted in part and denied in part Defendants' motion to
18 dismiss. ECF No. 60. The Court dismissed with prejudice all of Plaintiff's claims against
19 Defendant Board of Trustees with the exception of Plaintiff's Age Discrimination Act claim. The
20 Court granted leave to amend only with respect to Plaintiff's due process claims against
21 Defendants Abramson and Gaynard. As to the remainder of Plaintiff's claims against the
22 individual Defendants, the Court denied Defendants' motion to dismiss Plaintiff's § 1983
23 retaliation claim as related to the SCILL program, but dismissed with prejudice Plaintiff's other
24 claims. The Court also dismissed Defendants Rech, Sneary, Boothby, and Wilkinson, as Plaintiff
25 had failed to secure Court approval or a stipulation to add new parties to the action.

26 On October 13, 2014, Plaintiff filed his SAC. ECF No. 64. Defendant Board of Trustees
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1 filed an answer on October 27, 2014. ECF No. 67. The individual Defendants filed the instant
2 motion to dismiss that same day. ECF No. 66. Plaintiff filed an opposition on November 11, 2014,
3 ECF No. 68, and Defendants filed their reply on November 18, 2014, ECF No. 69.

4 On October 27, 2014, Plaintiff filed a motion for leave to file a motion for reconsideration
5 of the Court's September 29, 2014 order dismissing Defendants Rech, Sneary, Boothby, and
6 Wilkinson. ECF No. 65. The Court granted Plaintiff's motion for reconsideration on December 17,
7 2014. ECF No. 72.

8 **II. LEGAL STANDARD**

9 **A. Motion to Dismiss Under Rule 12(b)(6)**

10 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include "a
11 short and plain statement of the claim showing that the pleader is entitled to relief." A complaint
12 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure
13 12(b)(6). The Supreme Court has held that Rule 8(a) requires a plaintiff to plead "enough facts to
14 state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
15 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the
16 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
17 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a probability
18 requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully."
19 *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, a court
20 "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light
21 most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d
22 1025, 1031 (9th Cir. 2008). Moreover, pro se pleadings are to be construed liberally. *Resnick v.*
23 *Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) ("[I]n general, courts must construe pro se pleadings
24 liberally.").

25 However, a court need not accept as true allegations contradicted by judicially noticeable
26 facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and the "[C]ourt may look
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1 beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6)
2 motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).
3 Nor is the court required to "assume the truth of legal conclusions merely because they are cast in
4 the form of factual allegations." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per
5 curiam) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere
6 "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to
7 dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); *accord Iqbal*, 556 U.S. at 678.
8 Furthermore, "a plaintiff may plead herself out of court" if she "plead[s] facts which establish that
9 [s]he cannot prevail on h[er] . . . claim." *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir.
10 1997) (internal quotation marks omitted).

11 **B. Leave to Amend**

12 If the Court determines that the complaint should be dismissed, it must then decide
13 whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave
14 to amend "should be freely granted when justice so requires," bearing in mind that "the underlying
15 purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or
16 technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation
17 marks omitted). When dismissing a complaint for failure to state a claim, "a district court should
18 grant leave to amend even if no request to amend the pleading was made, unless it determines that
19 the pleading could not possibly be cured by the allegation of other facts." *Id.* at 1130 (quoting *Doe*
20 v. *United States*, 58 F.3d 494, 497 (9th Cir. 1995)). Furthermore, the Court "has a duty to ensure
21 that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance
22 of technical procedural requirements." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
23 Cir. 1990). Nonetheless, a court "may exercise its discretion to deny leave to amend due to 'undue
24 delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by
25 amendments previously allowed, undue prejudice to the opposing party. . . , [and] futility of
26 amendment.'" *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892–93 (9th Cir. 2010)

1 (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

2 **III. DISCUSSION**

3 In the instant motion, Defendants argue that Plaintiff has failed to adequately allege facts
4 showing a protected property or liberty interest, and that the Defendants are entitled to qualified
5 immunity. The Court concludes that Plaintiff has once again failed to allege the existence of a
6 protected property interest. As such, the Court does not reach Defendants' qualified immunity
7 defense.

8 In the Court's September 29, 2014 order granting in part and denying in part Defendants'
9 motion to dismiss, the Court dismissed without prejudice Plaintiff's due process claim against the
10 individual Defendants. Plaintiff alleged that his denial of admission to the SCILL and CLS
11 programs constituted a deprivation of a property interest. FAC ¶ 47. More specifically, the Court
12 found that Plaintiff pled "no facts showing that University regulations, state law, or any other
13 independent source created a legitimate claim of entitlement to admission to the programs." *Id.* at
14 20. While the Court found that Plaintiff had failed to allege a protected property interest, the Court
15 granted leave to amend as amendment would not necessarily be futile. ECF No. 60 at 20–21.

16 The procedural guarantees of the Due Process Clause of the Fourteenth Amendment apply
17 only when a constitutionally protected liberty or property interest is at stake. *See Johnson v.*
18 *Rancho Santiago Comm. Coll. Dist.*, 623 F.3d 1011, 1029 (9th Cir. 2010) ("To succeed on a
19 substantive or procedural due process claim, the plaintiffs must first establish that they were
20 deprived of an interest protected by the Due Process Clause."); *Neal v. Shimoda*, 131 F.3d 818,
21 827–28 (9th Cir. 1997). In determining whether an interest triggers constitutional protection, the
22 Court must "look not to the 'weight' but to the nature of the interest at stake." *Bd. of Regents of St.*
23 *Colls. v. Roth*, 408 U.S. 564, 570–71 (1972). "To have a property interest in a benefit, a person
24 clearly must have more than an abstract need or desire for it. He must have more than a unilateral
25 expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577; *see also Merritt v. Mackey*, 827 F.2d 1368, 1370–71 (9th Cir. 1987). "Protected property interests are

1 not created by the Constitution[, but r]ather . . . they are created and their dimensions are defined
2 by existing rules or understandings that stem from an independent source such as state law.”
3 *Johnson*, 623 F.3d at 1030 (9th Cir. 2010) (internal quotation marks omitted). Once a court
4 determines a protected interest is at stake, it applies the three-factor balancing test outlined in
5 *Mathews v. Eldridge*, 424 U.S. 319 (1976): (1) the private interest at stake; (2) the “risk of
6 erroneous deprivation of such interest through the procedures used, and probable value, if any, of .
7 . . substitute procedural safeguards”; and (3) the government’s interest. *Id.* at 335.

8 Here, the Court finds that Plaintiff has once more failed to allege facts showing that he has
9 a protected property or liberty interest in admission to the SCILL and CLS programs. In his SAC,
10 Plaintiff again alleges that the individual Defendants violated his due process rights under the
11 Fourteenth Amendment. Plaintiff pleads that as a “long-term unemployed” individual,
12 “professional retraining and re-entry of the workforce is a quest for his constitutionally guaranteed
13 rights to ‘[l]ife, [l]iberty and the pursuit of [h]appiness.’” SAC ¶ 46. Plaintiff further alleges that
14 California State University (“CSU”) received \$5 billion dollars in funding from the American
15 Recovery and Reinvestment Act, Workforce Investment Act, and Workforce Innovation and
16 Opportunities Act. *Id.* ¶ 48. According to Plaintiff, “access to the professional retraining funded by
17 these acts constitutes Plaintiff’s right and property.” SAC ¶¶ 48–49. As Defendants note, none of
18 these statutes creates an entitlement to admission to the CLS or SCILL programs. *See* Motion at 5;
19 *see also Johnson*, 623 F.3d at 1030; *Stretten v. Wadsworth Veterans Hosp.*, 537 F.2d 361, 366–67
20 (9th Cir. 1976) (“[T]here must exist rules or understandings which allow the claimant’s
21 expectations to be characterized as a legitimate claim of entitlement to (the benefit).”) (internal
22 quotation marks omitted).

23 Other than Plaintiff’s allegation that CSU received federal funding, Plaintiff does not
24 allege that the funding statutes imposed conditions or otherwise created any specific entitlement
25 for Plaintiff to be admitted to the SCILL or CLS programs. Plaintiff identifies no specific
26 provision of the American Recovery and Reinvestment Act, Workforce Investment Act, or

1 Workforce Innovation and Opportunities Act¹ that supports his argument that he has a protected
2 property or liberty interest. The claim that Congress “enacted the . . . acts that intend to retrain the
3 unemployed,” is insufficient to show that Plaintiff has a legal entitlement to admission to the
4 SCILL or CLS programs. Contrary to Plaintiff’s assertions, the mere existence of federal funding
5 does not create a protected property interest.

6 In opposition to Defendants’ motion to dismiss, Plaintiff cites California Education Code
7 § 66201. *See Opp.* at 2. Section 66201 provides:

8 It is the intent of the Legislature that each resident of California
9 who has the capacity and motivation to benefit from higher
10 education should have the opportunity to enroll in an institution of
11 higher education. Once enrolled, each individual should have the
12 opportunity to continue as long and as far as his or her capacity and
13 motivation, as indicated by academic performance and commitment
14 to educational advancement, will lead him or her to meet academic
15 standards and institutional requirements.

16 The Legislature hereby reaffirms the commitment of the State of
17 California to provide an appropriate place in California public
18 higher education for every student who is willing and able to benefit
19 from attendance.

20 According to Plaintiff, this statement of legislative intent is sufficient to create a legal entitlement
21 to admission to the SCILL and CLS programs. As Defendants argue, however, § 66201, a
22 provision of the Donahoe Higher Education Act, describes only the general policy goals related to
23 higher education in California. That the state legislature intended that all residents “should have
24 the opportunity to enroll in an institution of higher education,” does not create a legal entitlement
25 to admission. “A reasonable expectation of entitlement is determined largely by the language of
26 the statute and the extent to which the entitlement is couched in mandatory terms.” *Wedges/Ledges*
27 of Cal., Inc. v. Phoenix, 24 F.3d 56, 62 (9th Cir. 1994) (internal quotation marks omitted). A
28 statement of legislative intent stating residents *should* have the *opportunity* to enroll in programs
like SCILL or CLS does not involve “the use of the imperative,” or otherwise provide a

26 ¹ Additionally, as Defendants correctly note, the Workforce Innovation and Opportunities Act was
27 not enacted until 2014, and therefore subsequent to any of the events forming the basis of
Plaintiff’s claims. *See Motion* at 6.

1 “significant substantive restriction on the [Defendants’] discretion.” *Id.* The Court therefore
2 concludes that § 66201 does not create a property interest in admission to graduate studies
3 programs.

4 This conclusion is supported by § 66001 of the Donahoe Act, which provides that:

5 It is the intent of the Legislature to outline in statute the broad policy
6 and programmatic goals of the master plan and clear, concise
7 statewide goals and outcomes for effective implementation of the
8 master plan, attuned to the public interest of the people and State of
9 California, and to expect the system as a whole and the higher
education segments to be accountable for attaining those goals.
However, consistent with the spirit of the original master plan and
the subsequent updates, **it is the intent of the Legislature that the
governing boards be given ample discretion in implementing
policies and programs necessary to attain those goals.**

10 Cal. Educ. Code § 66001 (emphasis added). Plaintiff may be correct that a “goal” of the Donahoe
11 Act is to ensure that all residents of California have the opportunity to enroll in programs such as
12 SCILL and CLS. The existence of a “goal,” however, especially in light of the “ample discretion”
13 left to the programs, is insufficient to create a property interest. *See Wedges/Ledges*, 24 F.3d at 62;
14 *see also Doyle v. City of Medford*, 606 F.3d 667, 672–73 (9th Cir. 2010) (“A regulation granting
15 broad discretion to a decision-maker does not create a property interest.”). As Defendants note, no
16 court has interpreted § 66201 to impose a substantive restriction on the discretion of admissions
17 bodies in making admissions decisions. At bottom, Plaintiff’s argument appears to be that every
18 resident of California has a property interest in admission to graduate studies programs, but the
19 Court finds no support for that claim in § 66201 or any other authority Plaintiff cites.

20 The Court concludes that Plaintiff has once again failed to allege facts showing a protected
21 property interest in admission to the SCILL or CLS programs. As showing a protected interest is a
22 “necessary precondition” to a procedural due process claim, Plaintiff has failed to allege a due
23 process claim. *See Roth*, 408 U.S. at 570–71; *Rhee v. City of Los Angeles*, 130 F. App’x 920, 921
24 (9th Cir. 2005). Furthermore, as the Court finds that Plaintiff has failed to state a procedural due
25 process claim, the Court does not reach Defendants’ qualified immunity defense.

26 Here, Plaintiff has been unable to identify any protected liberty or property interest in

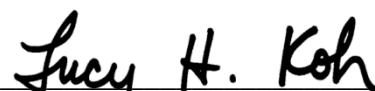
1 admission to the SCILL or CLS programs despite multiple opportunities to amend his complaint.
2 Consequently, the Court concludes that amendment would be futile. *See Carvalho*, 629 F.3d at
3 892–93. The Court therefore dismisses Plaintiff's procedural due process claim with prejudice.

4 **IV. CONCLUSION**

5 For the reasons stated above, the Court GRANTS with prejudice Defendants' motion to
6 dismiss Plaintiff's due process claim.

7 **IT IS SO ORDERED.**

8 Dated: February 25, 2015

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10 LUCY H. KOH
United States District Judge

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United States District Court
Northern District of California